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IN THE

Supreme Court of the United States

No. 328

T. VAIL PALMER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, T. Vail Palmer, Jr., prays that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit, which by a divided court (4-3) affirmed the decision and judgment of the District Court for the Eastern District of Pennsylvania. The District Court held, and the majority of the Court of Appeals affirmed that, when T. Vail Palmer, Jr., refused to comply with an *invalid* order to report for induction into the armed forces, he was guilty of a felony under the Universal Military Training and Service Act (62 Stat. 604, 1948, 50 U. S. C. A. App. sec. 451 *et seq.*) and was precluded from asserting the invalidity of the order by reason of his re-

fusal to cooperate with the Selective Service System in submitting official forms and taking an appeal.

All the judges—District and Appeal—found that petitioner was a sincere conscientious objector and refused cooperation as a matter of conscience. They also stated on the basis of the information in his Selective Service file that he should have been classified 1-O (conscientious objector), 1-S (student), IV-D (divinity student) or IV-F (unacceptable for military service) and that there was *no* evidence in his file justifying the classification 1-A (available for military service), on which the order to report for induction was based.

Opinion Below

The opinions of the majority and minority of the Court of Appeals, with appendix, is not reported and is printed as Appendix A to this petition (pp. 21-47). The opinion of the District Court is reported (122 F. Supp. 938) and is printed as Appendix B, *infra* (pp. 48-54).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 20th, 1955. This Court by order extended the time to file petition for writ of certiorari to and including August 19th, 1955.

The jurisdiction of this Court is invoked under Title 28 U. S. C. sec. 1254, Ch. 646 Public Law 773, 80th Congress, authorizing certiorari upon the petition of any party to a criminal case in the federal courts, and under the Administrative Procedure Act Sec. 10 (5 U. S. C. 1009, 60 Stat. 237, 1946) guaranteeing judicial review of all final administrative orders.

The Questions Presented

1) Can a man be convicted of a crime for violating an admittedly invalid administrative order, such as that in the present case?

2) Is a man deprived of the defense that he has committed no crime, solely because he failed to participate in the administrative process giving rise to the invalid order, the violation of which is alleged as his crime?

3) Can the theory of "exhaustion of administrative remedies" be applied to deprive a man of the defense to criminal prosecution that the administrative order alleged to be violated is invalid, because, on the basis of a conscientious objection to war and agencies related to war, he refused to cooperate with Selective Service? Especially, can the theory be so applied where the administrative process of Selective Service could be (under the regulations) and was in fact completed without his cooperation *and* a final order has been issued which is admittedly invalid?

4) Is the Court under the *Falbo case* precluded from considering the invalidity of a Selective Service order (admittedly invalid under the *Dickinson case*), if the registrant, and the religion of which he is a part, has a religious objection to participating with Selective Service as a part of the war making system—

   a) Under the original *Falbo* doctrine as modified in the *Estep* case?

   b) Under the protection of religious freedom guaranteed by the First Amendment to the United States Constitution?

c) Under the Federal Administrative Procedure Act, sections 10 and 12 as interpreted in *Shaughnessy v. Pedreiro*, 75 S. Ct. 591, since the 1948 Universal Military Training and Service Act, under which the present order and case arose, does not "expressly" preclude judicial review as required by section 12 in order to escape the mandatory "judicial review" granted by section 10?

5) Was the classification and order to report for induction in this case invalid, and therefore to be set aside, under the *Estep* and *Dickinson* cases?

Statutes and Regulations Involved

The portions of the statutes and regulations involved are extensive and are printed as Appendix C. They include: Universal Military Training and Service Act, 65 Stat. 75, 83, 86, secs. 6 (g), (i), (j), (m) (50 U. S. C. App. 456 (g), (i), (j), (m)); sec. 10 (b) (3) (50 U. S. C. App. 460 (b) (3)); sec. 12 (a) (50 U. S. C. App. 462 (a)); Administrative Procedure Act, 60 Stat. 237 (1946), sec. 10, sec. 12 (5 U. S. C. 1009, 1011).

The following sections of Selective Service Regulations (32 C. F. R.) are involved: 1604.54, 1613.41, 1622.1, 1622.14, 1622.15, 1622.43, 1622.44, 1623.1, 1623.2, 1625.3, 1625.14, 1626.2, 1642.31. Selective Service Local Board Memo. 41 (11/30/51).

Statement of the Case

There is no conflict in the evidence and since the opinion of the District Court and those of the majority and minority of the Court of Appeals adequately present the essential evidence, the record, as in the Court below, has been limited to these opinions and their appendix.

In 1948 petitioner informed his local draft board at Modesto, California that because of his religious beliefs (Quaker) he could not register for the draft. In 1950 he notified the board at Media, Pennsylvania, that he was now in their district. On November 20, 1950 he was sentenced by the United States District Court, Eastern District of Pennsylvania, to serve 1 year and 1 day in a federal penitentiary for refusal to register. Just prior to his release from prison, about August 31, 1951, he was involuntarily registered by the warden at Danbury, Connecticut. His registration was forwarded to the Media board and on December 5, 1951 that board sent him Selective Service Questionnaire (form 100). He returned the form unexecuted, again stating his religious position and that he was a theological student at Oberlin, Ohio. His student and theological status was confirmed to the board by a letter of Dean Stidley of Oberlin, December 11, 1951. On February 12, 1952 the Board sent SSS form 150 (on which to record facts concerning conscientious objection to war), giving five days to answer. On February 14th, without waiting the five days, the Board classified petitioner 1-A (available for military duty). On February 15th petitioner returned the form unexecuted, but accompanied by a letter containing *all* the information required by the form. No other classification was ever given petitioner.

The classification of February 14th was invalid for at least the following reasons (most of which the lower courts state in their opinions):

a) There was no evidence in petitioner's file to substantiate the 1-A classification. The uncontradicted evidence in the file entitled him to classification which would not require him to report for induction (1-O, conscientious objector; 1-S, student; IV-D, ministerial student; IV-F,

previously convicted of felony). *See* Estep v. United States, 327 U. S. 114 (1946), Dickinson v. United States, 346 U. S. 389 (1953), Universal Military Training and Service Act, 50 U. S. C. App., sec. 456 (i), (g), (j), (m), Selective Service Regulations 1622.14, 1622.15, 1622.43, 1622.44, 1625.3 (b).

b) Under the Selective Service Regulations (1623.1) classification could not legally be made on February 14th or until after the expiration of the five days for indicating conscientious objection (2/17/52).

c) Petitioner was registered in Danbury, Connecticut, and the Media Board had no jurisdiction. (See, S. S. Regs. 1613.41 as it read in 1951-52, 1604.54, 1642.11).

d) The law required the Board to classify on the basis of all material in its files, whether or not on official forms. (S. S. Regs. 1622.1, 1623.1, 1623.2, Sel. Serv. System Local Board Memo. 41, 11/30/51).

On the basis of the invalid classification of February 14th, petitioner was notified to report for induction into the armed forces on May 20, 1952. Continuing his religious position as a Quaker conscientious objector, petitioner did not report. He was indicted and tried for failure to report for induction. The government introduced the total Selective Service file. Petitioner introduced no testimony. The District Court Judge (and with this the majority and minority in the Court of Appeals agreed) recognized that ordinarily where all the substantial evidence in the file justified a classification other than 1-A, the conviction could not stand (Dickinson v. United States, 346 U. S. 389) but felt himself unable to consider this defense solely because petitioner had not exhausted his administrative remedies. Petitioner was found guilty as charged.

The lower Court had jurisdiction under 18 U. S. C. sec. 3231 and 50 U. S. C. App. sec. 462.

Reasons for Allowance of Certiorari

1) *There is a conflict between the decisions of the various Circuits as to whether a draftee under the 1948 Universal Military Training and Service Act can assert the defense in a criminal prosecution that the order to report for induction was invalid, if he has not cooperated with Selective Service and "exhausted administrative remedies."*

The *Ninth* Circuit has required exhaustion of remedies in Kalpakoff v. United States, 217 F. 2d 748 (1954), Williams v. United States, 203 F. 2d 85 (1953), Skinner v. United States, 215 F. 2d 767 (1954) and Mason v. United States, 218 F. 2d 375 (1955).

The *Fifth* Circuit has not required exhaustion but has referred to exhaustion having occurred in Tamblyn v. United States, 216 F. 2d 345 (1954) and Williams v. United States, 216 F. 2d 350 (1954). But it has also considered the invalidity of an order though defendant failed to appear at hearings in Moon v. United States, 220 F. 2d 730 (1955).

The *Seventh* Circuit appears to have required exhaustion in United States v. Rumsa, 212 F. 2d 927 (1954) but not in United States v. Greene, 220 F. 2d 792 (1955).

The *Eighth* Circuit recognized exceptions to the exhaustion requirement but demanded exhaustion in Doty v. United States, 218 F. 2d 93 (1955).

The *Tenth* Circuit considered a classification though no exhaustion appears to have occurred, Rempel v. United States, 220 F. 2d 949 (1955).

The *Second* Circuit considered the validity of a classification though it said that because of failure to report, "His right to attack his classification is therefore, doubtful." (United States v. Bendik, 220 F. 2d 249, 1955) and Judge Frank had earlier viewed lack of due process as excusing exhaustion in Schwartz v. Strauss, 206 F. 2d 767.

Various District Courts have excused defendants from the requirement of exhausting administrative remedies in numerous cases.

2) *The decision of the United States Court of Appeals, Third Circuit, in this case decides a question of federal law which has not been, but should be, settled by this Court.*

This Court has not passed on whether, under the 1948 Universal Military Training and Service Act, a draftee must fill in official forms and cooperate with Selective Service at all stages before he can assert the invalidity of the board's classification in a criminal prosecution against him for refusing to comply with the draft board's order to report, which order is based on the invalid classification.

This issue is important. As the previous section shows, there are ten to fifteen cases on this point to reach the Circuit Courts in the past year. Since the decision in this case not less than ten Professors of Administrative Law, and civil liberties and Church groups have urged counsel to appeal this case. The Court of Appeals refers to 4000 local volunteer lay boards classifying 15½ million young men. This country has been under conscription for 15 years and conscription has just been extended four years more. No law touches more people so directly and at so critical an age. The draft boards have the authority and machinery, and the regulations require them, to properly classify persons like petitioner who cannot cooperate—but

the boards have not. This Court in United States v. Nugent, 346 U. S. 1, required draft boards to furnish registrants a fair resumé of the F. B. I. report in order to meet due process requirements—and the boards have complied. In Dickinson v. United States, 346 U. S. 389, this Court required the draft boards to develop a record and ground their classification in the record, as other administrative agencies have to—and the boards have complied. It is now time to require the boards to follow Selective Service Regulations and pay attention to information in their files without requiring the registrant to "render the pinch of incense to Ceasar" that requires him to give up his conscience and bow to the board's authority by filling in official forms—and the boards will be able to comply.

Falbo v. United States, 320 U. S. 549 (1944) and Estep v. United States, 327 U. S. 114 (1946) were decided under the previous Selective Service Act of 1940, which was a wartime measure, where the administrative procedures were different and where the Administrative Procedure Act did not apply. In the Falbo case the order which defendant tried to attack was *not a final order.* In the Estep case, where the order was final (as in the present case) this Court allowed the assertion of the defense of invalidity of the classification. Both cases refer to exhaustion of remedies, but the Estep case cites with approval Tung v. United States, 142 F. 2d 919 (C. A. 1st, 1944) in which exhaustion was excused under circumstances comparable to the instant case. The Court of Appeals majority in the present case viewed the Falbo case as controlling; the minority relied on the Estep case.

3) *The decision of the Court of Appeals, Third Circuit, in this case is probably in conflict with applicable decisions of this Court.*

This Court decided in the Estep case that the invalidity of a board's classification—clearly beyond its jurisdiction as contrary to the law or evidence—could be asserted as a defense to the criminal charge of refusing to obey the order to report for induction, saying:

> "We cannot infer (that a person) should go to jail for not obeying an unlawful order of an administrative agency * * * "

More recently this Court in the Selective Service cases of Dickinson v. United States, 346 U. S. 389 (1953) and the four companion cases of Witmer, Simmons, Sicurella, Gonzales, 75 S. Ct. 392-414 (1955) followed this same rule that an invalid order will not support criminal conviction. And Justice Frankfurter has recently warned:

> "Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, the Court ought not to reject a construction of Congressional language which assures justice in cases where sincerity of another's religious conviction is at stake and when prison may be the alternative to an abandonment of conscience."
>
> United States v. Nugent, 346 U. S. 1, 12.

4) *The majority of the Court of Appeals relied on cases in this Court which, if they ever did support that Court's decision, have been deprived of present application by changes in statutory and case law.*

The Court relied on Falbo v. United States, 320 U. S. 549 (1944) and the reference in United States v. Balogh, 329 U. S. 692 (1947) to the Falbo case. The Falbo case held that a Selective Service order to report for induction was not "final", as the procedure stood at that time, since a physical examination and other administrative action remained to be taken before Falbo could be inducted, and

therefore the order could not be reviewed in the criminal prosecution. The administrative procedure was changed so that the order to report became final without further administrative action, and in Estep v. United States, 327 U. S. 114 (1946) this Court allowed such review of the validity of the order, expressly citing with approval Tung v. United States, 142 F. 2d 919 (C. A. 1st, 1944) refusing to require exhaustion of remedies.

This is a distinction recognized by the dissenting judges in the Court below:

> "I think that the Supreme Court in the Falbo case merely applied the rule that failure to exhaust administrative remedies precluded resort to the courts to the extent of holding that the defense of invalidity of the board's order was not available to Falbo since he had not exhausted the administrative remedies open to him subsequent to the order for induction. For the order for induction was not final under the procedure then in effect."

Under the present procedure the order to report is final, and this was also also recognized by the dissenting judges below to bring the present case under the Estep rather than the Falbo decision:

> "It is worth noting also that even though Palmer had not followed the intermediate administrative procedure available to him the administrative process had ended in his case with the board's order for his induction. For that order was a final one the disobedience of which could be defended, exhaustion of intermediate remedies aside, upon the ground of its invalidity. Permitting him to interpose in this case the defense of the invalidity of the order accordingly cannot have the effect of interrupting the administrative process of selection which is the basic reason for the exhaustion doctrine itself and the consideration which moved the Court to deny the right to interpose the defense of invalidity in the Falbo case. In this respect the present case is indistinguishable from Estep."

Furthermore, the Federal Administrative Procedure Act, which became effective after the Falbo and Estep cases, has made much more specific the right to judicial review of all final agency action. Section 10 of that Act (5 U. S. C. 1009) in part provides:

> "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

and again:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

and still further:

> "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement * * * "

In recommending the adoption of this section, the reports of the House and Senate Committees, Sen. Doc. No. 248, 79th Cong., 2d Sess. in part said:

> "There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective."

It is clear that the order to report for induction is "final" within the meaning of the Federal Administrative Procedure Act for the Universal Military Training and Service Act of 1948 as amended reads:

> "The decisions of such local board *shall be final*, except where an appeal is authorized and *is taken* * * * "

The provision does not say that the order is final unless an appeal "is available"—it says, "is taken"—and no appeal was taken herein. It is clear that section 10 of the Federal Administrative Procedure Act applies to review

of Selective Service orders under the 1948 Universal Military Training and Service Act. The Administrative Procedure Act was adopted in 1946; the Service Act was adopted in 1948; and the Administrative Procedure Act provides, sec. 12 (5 U. S. C. 1011):

> "No subsequent legislation shall be held to supersede or modify the provisions of this chapter *except to the extent that such legislation shall do so expressly.*"

There is only a partial exclusion in the Universal Military Training and Service Act (50 U. S. C. App. sec. 463) in these words:

> "All *functions* performed under this title shall be excluded from the operation of the Administrative Procedure Act. * * *";

Court review is not a "function performed under" the Military Training and Service Act—Court review is not even mentioned in that Act. Therefore Court review is provided by the Federal Administrative Procedure Act and is not "superseded or modified" "expressly" by the Service Act.

This Court has very recently given this same effect to sections 10 and 12 of the Administrative Procedure Act as expanding judicial review and overcoming previous case restrictions in Shaughnessy v. Pedreiro, 75 S. Ct. 591 (1955). The 1917 Immigration Act had provided that the Attorney General's deportation orders should be "final" and in Heikkila v. Barber, 345 U. S. 229 this Court had held that the Administrative Procedure Act had not changed the rule under the 1917 Act that only a limited review could be had by habeas corpus, on the ground that section 10 "expected statutes that precluded judicial review." But, the Pedreiro case posed the problem under the new 1952 Immigration Act and the Court refused to follow the Heikkila rule, saying:

"In the subsequent 1952 Immigration and Nationality Act there is no language which 'expressly' supersedes or modifies the expanded right of review granted by sec. 10 of the Administrative Procedure Act. But the 1952 Immigration Act does provide, as did the 1917 Act, that deportation orders of the Attorney General shall be 'final'. The Government contends that we should read this as expressing a congressional purpose to give the word 'final' in the 1952 Act precisely the same meaning Heikkila gave 'final' in the 1917 Act and thereby continue to deprive deportees of all right of judicial review except by habeas corpus. We cannot accept this contention.

"Such a restrictive construction of the finality provisions of the present Immigration Act would run counter to sec. 10 and sec. 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequent enacted statutes like the 1952 Immigration Act. And, as the Court said in the Heikkila case, the Procedure Act is to be given a 'hospitable' interpretation."

Therefore, because of changes in the Selective Service procedure and in the case law relating to Selective Service, and because of the enactment of the Administrative Procedure Act and the subsequent enactment of the 1948 Universal Military Training and Service Act, and because of the cases interpreting sections 10 and 12 of the Administrative Procedure Act, if the Falbo case ever supported the position of the majority below, it now no longer applies.

5) *The present decision is out of harmony with the general principles of exhaustion of administrative remedies, including the exceptions thereto. There is no sound basis why different rules should apply to review of Selective Service as compared to other administrative agencies, and the rules therefore need to be harmonized.*

The majority of the Court of Appeals in this case seems to by-pass the exhaustion of administrative remedies law, including the recognized exceptions to the requirement of exhaustion, by considering that total refusal to cooperate is different from non-exhaustion (partial refusal?), for it says:

> "In argument and brief we have been given an analysis of the authorities bearing upon the legal question: when must one exhaust his administrative remedies before court help is available? That problem is always interesting and sometimes a very difficult one and we are grateful to counsel for appellant for his analysis of it. However, we do not think we must thread our way among delicate distinctions in this case. *This defendant not only has failed to exhaust his administrative remedy; he ignores the whole carefully prepared system altogether.*

No such distinction can be found in the law. The cases developing the exhaustion rule and its exceptions involve both total refusal to utilize administrative remedies and partial refusal.

The exhaustion of administrative remedies rule is not a formalistic, mandatory or iron-clad requirement. It is a rule of reason, judicial self-restraint and orderly procedure by which Courts assure that administrative agencies be allowed to act first and be reviewed later. The case of Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1939), most often cited for the doctrine, was one in which there was an attempt to enjoin agency action before any agency action had occurred thus preventing agency action and nullifying the statute; there was only a supposed or threatened injury. The difference between the Myers and the instant case is profound—in our case the administrative agency has fully acted; there is a final order; it is being enforced in a criminal proceeding; if there is to be any review, it is now or never.

This Court has often recognized that the exhaustion rule is a flexible one and that exhaustion will not be required where there is "irreparable injury", orders which are "on their face plainly invalid" or "in disregard of law", or beyond the agency's jurisdiction, or probably unconstitutional—particularly where the defendant merely asserts the invalidity of the order as a defense in a criminal prosecution, rather than seeks an injunction or other affirmative action—and also where only administrative appeal or reconsideration remains or the agency's previous disregard of proper procedure makes the obtaining of adequate relief in the agency improbable:

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752, 773 (1947):

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

U. S. v. Abilene & So. Ry. Co., 265 U. S. 274, 282 (1924):

> "* * * Whether it (the Court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion."

Levers v. Anderson, 326 U. S. 219, 222 (1945):

> "But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions (citing cases) from which we see no reason to depart."

Eccles v. Peoples Bank, 333 U. S. 426, 434 (1948):

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before completion of the administrative process."

One case in which this Court refused to require exhaustion of remedies before considering questions like those presented in the instant case should be discussed, for it involved the "Renegotiation Act (which) was developed as a major wartime policy of congress *comparable to that of the Selective Service Act*" (p. 754). In Lichter v. United States, 334 U. S. 742 (1947) the War Contracts Price Adjustment Board had renegotiated certain contracts and fixed the profit to be recovered by the government. The Act provided that "in the absence of the filing of a petition with the Tax Court * * * such order (of the Board) shall be final and conclusive and shall not be subject to review or redetermination by any Court * * *" The Government suggested that since the contractors failed to exhaust administrative remedies by petitioning the Tax Court, they could not set up any defense against an action by the Government to recover excess profits. But the Court allowed issues of unconstitutionality and legality of the Board's action and only refused to hear issues such as the amount of the profits which should more properly be determined by the Tax Court.

See also the following cases which refused to require exhaustion of administrative remedies. These seem to fall into the following categories:

a) Irreparable injury:
   Public Utility Comm. v. United Fuel Gas Co., 317 U. S. 456 (1943);
   Utah Fuel Co. v. Bituminous Coal Comm., 306 U. S. 56 (1939).

b) Defendant merely defends against an invalid order:
F. P. C. v. Panhandle E. Pipe Line Co., 337 U. S. 498 (1949).

c) Orders on their face plainly invalid or in disregard of law:
P. U. C. v. United Fuel Gas Co., *supra;*
See D. & H. Co. v. U. S., 266 U. S. 438 (1924).

d) Unconstitutionality:
Hillsborough v. Cromwell, 326 U. S. 620 (1946).

e) Agency action beyond its jurisdiction:
Gonzales v. Williams, 192 U. S. 1 (1904);
Skinner & Eddy Corp. v. U. S., 249 U. S. 557 (1919);
P. U. C. v. United Fuel Gas Co., *supra;*
Ill. Comm. v. Thompson, 318 U. S. 675 (1943).

f) Improbability of obtaining adequate relief in the administrative process:
Smith v. Illinois Bell Co., 270 U. S. 587 (1926);
Order Ry. Cond. v. Swan, 329 U. S. 520 (1947);
Union Pac. Ry. v. Board, 247 U. S. 282 (1918);
Waite v. Macy, 246 U. S. 606 (1918);
Hillsborough Tp. v. Cromwell, 326 U. S. 620 (1946).

g) Administrative agency has itself failed to comply with the Regulations:
U. S. v. Shaughnessy, 336 U. S. 806 (1948).

h) Agency order is final and only administrative appeal or reconsideration remains:
Prendergast v. N. Y. Tel. Co., 262 U. S. 43;
U. S. v. Abilene & S. R. Co., 265 U. S. 274 (1924);
Levers v. Anderson, 326 U. S. 219 (1945).

It is respectfully submitted that in the present case almost all of these factors are present: the Media Board exceeded its jurisdiction; there was a lack of due process; clear errors of law and unconstitutional action appear; the order to report for induction was final with only administrative

reconsideration possible; adequate administrative relief was improbable in the light of the total disregard of evidence in the file; the petitioner was not seeking affirmative relief but was defending against criminal prosecution; the Board itself refused to abide by the regulations or complete action on behalf of the petitioner (S. S. Regs. 1626.2 and 1642.31).

6) *The decision of the District Court and of the Court of Appeals in this case has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.*

Violation of an invalid order has been made a crime.

An admittedly valid defense has not been heard.

Selective Service's wilful violations of regulations have been excused, but petitioner's non-cooperation solely through religious belief has been punished.

Petitioner has in effect been told to give up his religious conscience or be branded a felon.

Since this Court has on several occasions referred to early Quaker conscientious refusal to comply with unjust laws as productive of the First Amendment (330 U. S. 1, 10-11; 319 U. S. 624, 633), perhaps it would be proper to conclude this Petition with the final words of the petition of Quakers imprisoned in Lancaster Castle in 1660:

> "Wee Desire nothing from you but yt wee may live quietly and peaceably in our owne houses, Eate our own bread and follow our own Callings in the feare of God for the good of all; and to mete together to serve and worship our God according as hee requireth of us. But, if you will not Grant theise things unto us, then shall we lye downe in the peace of our God and patiently Suffer under you."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court, on a day certain to be herein named, the designated record used on the appeal and all other proceedings had in this case and numbered on its docket 11,449, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Third Circuit may be reversed; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

T. VAIL PALMER, JR.,
Petitioner.

HARROP A. FREEMAN,
and
JOHN W. MacDONALD,
103 Needham Place,
Ithaca, New York,
Attorneys for Petitioner.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,449

UNITED STATES OF AMERICA
v.
T. VAIL PALMER, JR.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued January 7, 1955
Reargued June 6, 1955

Before BIGGS, *Chief Judge*, MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed June 20, 1955)

By GOODRICH, *Circuit Judge*.

T. Vail Palmer, Jr., was convicted in the District Court for the Eastern District of Pennsylvania *for refusing to appear for induction into the armed forces pursuant to the order of a local selective service board*. The District Court denied his motion for judgment of acquittal, 122 F. Supp. 938, and he has appealed.

Palmer, a member of the Religious Society of Friends, was convicted in the District Court in 1950 for failure to register under the Selective Training and Service Act and he served a term of imprisonment. Just before his release from prison on September 1, 1951, he was registered by the warden in accordance with the selective service regulations and his registration was forwarded to Local Board No. 60 at Media, Pennsylvania. On December 5, 1951, the local board mailed Palmer a classification questionnaire, Form No. 100. He returned it without filling it out or signing it but accompanied it by a letter dated December 9th and signed by him. This letter, and other communications from Palmer, are collected as an Appendix to the majority and minority opinions herein. Also accompanying Palmer's letter was a copy of a statement he had made in the District Court when convicted for failing to register. In July 1950, prior to that conviction, Palmer had written the local board two letters, the second being in reply to an order of the board directing him to appear for a conference with regard to registration. *On December 17, 1951, the local board received a letter dated December 11th from the Dean of the Graduate School of Theology of Oberlin College giving information as to Palmer's status as a theological student in that institution.*

On January 30, 1952, the local board ordered Palmer to report on February 15th for a physical examination, which he failed to do. On February 12, 1952, the board sent him a copy of Form No. 150, the special form for claiming exemption by conscientious objectors, and on February 14th, *without waiting for the return of that form, the board classified Palmer in Class 1-A.* On February 19th the board received the Form No. 150 back from Palmer not filled out but accompanied by a letter signed by him

dated February 15th (See Appendix). On April 8, 1952, the board again ordered Palmer to report for a physical examination, this time on April 16th, and he again failed to do so. Except for copies of the letter and orders sent by the local board to Palmer and the board's correspondence with various officials of the Department of Justice and the Selective Service System respecting his prior indictment, conviction, imprisonment and registration, *these five letters and statement constituted the sole information concerning him* which was in the local board's file when on May 5, 1952, the board ordered him to report on May 20th for induction into the armed forces. It was his disobedience of that order which resulted in his indictment and conviction in the present proceeding.

On behalf of the appellant, Palmer, several arguments are advanced. The first and the one most quickly disposed of is a question about jurisdiction of the Local Board No. 60, Media, Pennsylvania. Palmer was registered while in federal prison in Danbury, Connecticut, and it is suggested that the board in that place and not the board at the place given by Palmer as his home has jurisdiction. This argument is incorrect. The question is clearly answered by regulation 1613.41, 32 C. F. R. § 1631.41 (1952). While the procedure for forwarding registration files in cases of this sort has been changed, that change in procedure does not affect the vesting of authority in the local board where the registrant is resident.

Second, it is urged that Palmer having once been convicted for failure to register may not now be convicted for failure to report for induction. The theory behind this ingenious argument is that Palmer's opposition to the military establishment is a single thing in his mind and conduct and if that is contrary to law, should be treated as

one offense. The recent Supreme Court decision in Bell v. United States, (May 9, 1955), is instanced to illustrate the point. From that very case comes the answer to the contention. Mr. Justice Frankfurter, speaking for the majority, said "the punishment appropriate for the diverse federal offenses is a matter for discretion of Congress, subject only to constitutional limitations * * *" The very fact situation of this case was necessarily included in the decision of the Eighth Circuit in Doty v. United States, 218 F. 2d 93 (1955).

Third, this brings us to the really hard point of this case. Here is a man whose good faith as a conscientious objector is not challenged. He likewise may be rejected for service because he has been convicted of the offense of failure to register. Cf. Doty v. United States, *supra*. As a theological student he was entitled to deferment *if he asked for it*. See 50 U. S. C. A. App. § 456(g) (1951). If he finished his theological course and became a minister of religion he had a further ground, this time for exemption. *Ibid*. The question is well asked: why, if a Court knows all this and a local board knows all this, should a man be convicted of an offense against the government for failing to take advantage of what was provided for him?

The expression of differences among members of a Court is much easier if the disagreement can come on some technical subject such as whether a given set of facts is sufficient to constitute a breach of contract *in limine*. Here we have the kind of differences in policy where there is little in the way of technical rule to guide us and where there are strong arguments, legal, logical and emotional, to be made on each side of the question.

There were on June 30, 1954, about *fifteen and a half million young men registered for military service* under

the Universal Military Training and Service Act. 62 Stat. 604 (1948), as amended, 50 U. S. C. A. App. § 451 *et. seq.* (1951). The administration of the Act was entrusted in the first instance to 3,920 local boards. These boards are composed of citizens only some of whom are lawyers and all of whom serve without pay as a matter of public service. It is apparent that if this enormous man power machine is going to work it demands a high degree of cooperation from everyone involved in it and with it.

No man has a constitutional right to be free from a call to military service. Selective Draft Law Cases, 245 U. S. 366 (1918); United States v. Henderson, 180 F. 2d 711 (C. A. 7), *cert. denied*, 339 U. S. 963 (1950). However, a sympathetic Congress, desirous to afford a maximum of freedom of conscience, has provided for complete exemption from service for some people and partial exemption for others. It has also provided for a rather elaborate machinery for appeal to make sure that mistakes of local boards do not result in a failure to give any registrant what is due him under the law. There is a method prescribed for handling all these claims for exemption in an orderly way. If rules must be laid down for the handling of Court business, as they are, and the proceedings of administrative bodies, as they are, there is even greater reason for the establishment of orderly procedure with nearly four thousand volunteer boards handling the cases of more than fifteen million young men. If we had only the problem of one village to consider with one board of citizens to raise a company of militia from that village there would be no need of elaborate rules. Simple things can be handled simply, of course. But that is not our case.

There must come a time when the interest of the citizenry as a whole must be insisted upon if the interests of both

majority and dissenters are to be protected. *The young man involved in this case says, and we do not doubt his good faith, that he is so much against all war organization that he will not fill out a questionnaire stating his grounds for exemption.* It would only be a step further for this or some other young man to say that he is so much against war that he will not pay taxes to a government which spends the majority of its income to maintain a military establishment. It is only one step further for this or some other young man to say that a government which depends upon force to maintain order and to protect itself against aggression of its neighbor is so bad a government that he feels no moral obligation to obey anything it says. It seems to us that all this is the logical outcome of the position which Palmer has taken. The defendant finds it impossible to fill out a questionnaire but he will write letters to a draft board. In other words, he wants this department of the government run his way.

In argument and brief we have been given an analysis of the authorities bearing upon the legal question: when must one exhaust his administrative remedies before Court help is available? That problem is always interesting and sometimes a very difficult one and we are grateful to counsel for appellant for his analysis of it. However, we do not think we must thread our way among delicate distinctions in this case. *This defendant not only has failed to exhaust his administrative remedy; he ignores the whole carefully prepared system altogether.* He seems to think that to fill out a questionnaire is like being directed to eat meat offered to idols. We do not think it is. But there must be some point at which a sympathetic society can say to a man, "If you want us to recognize what we admit is your honest belief, although it seems to us ill-founded, you must take certain steps to do it."

These draft cases have made difficult problems for the Federal Courts for quite a number of years. We list herewith for what it may be worth some of the recent decisions. Doty v. United States, already cited, presents a set of facts very close to this one and conviction was upheld. In Estep v. United States, 327 U. S. 114 (1946), the Supreme Court specifically said that Falbo v. United States, 320 U. S. 549 (1944), did not preclude the defenses asserted because the registrants in the Estep cases "had pursued their administrative remedies to the end. All had been done which could be done." While in Dickinson v. United States, 346 U. S. 389 (1953), attention was given to the point that administrative remedies had been exhausted by the defendant. What the Supreme Court was doing in these cases was not contrary to United States v. Falbo, *supra*.

The case of United States v. Balogh is also very illuminating. This case is reported at 157 F. 2d 939 (C. A. 2, 1946) (exhaustion rule not applied), vacated and remanded on *per curiam* opinion, 329 U. S. 692 (1947) (with directions to consider United States v. Falbo), 160 F. 2d 999 (1947) (exhaustion rule applied), cert. denied, 331 U. S. 837 (1947). In the following circuit court cases attention was called to the fact that administrative procedures had been availed of, Tamblyn v. United States, 216 F. 2d 345 (C. A. 5, 1954); Williams v. United States, 216 F. 2d 350 (C. A. 5, 1954); Moon v. United States, 220 F. 2d 730 (C. A. 5, 1955); while in the following cases complete exhaustion of administrative remedies was required, United States v. Balogh, *supra*; Doty v. United States, *supra*; Kalpakoff v. United States, 217 F. 2d 748 (C. A. 9, 1954); Williams v. United States, 203 F. 2d 85 (C. A. 9, 1953); Skinner v. United States, 215 F. 2d 767 (C. A. 9, 1954); Mason v. United States, 218 F. 2d 375 (C. A. 9, 1955); United States v.

Rumsa, 212 F. 2d 927 (C. A. 7, 1954); Cf. Olinger v. Partridge, 196 F. 2d 986 (C. A. 9, 1952).

As we have already said, however, we do not think these cases bear upon our problem except by inference because here the whole remedial process has been ignored by the defendant.

We do not say for a moment that this defendant is like the rat-like characters who so often come into criminal courts. He may be the prophet of a new day or he may be more dangerous than some of the rat-like characters because his type of refusal to co-operate, if sufficiently widespread, would make organized society impossible. In any event, we think the trial judge showed good sense in not sending him to jail. But it also seems to the majority of us that the conviction was right.

The judgment of the District Court will be affirmed.

MARIS, *Circuit Judge,* dissenting.

While I am in accord with the views of the majority as to the first and second points raised by Palmer on this appeal I must dissent from their conclusion that his failure to fill out and file the prescribed forms and to pursue the administrative remedies open to him precluded him from attacking in the District Court the validity of the local board's orders classifying and inducting him.

I think that all the information in the file which was before the local board in Palmer's case supports the conclusion, to which the District Court came, that he is a sincere conscientious objector who would have been entitled to a I-O classification if he had properly submitted the facts of his case to the selective service system. Likewise I find no support in the record for any other conclusion

than that at the time the board acted Palmer was a theological student satisfactorily pursuing a full time course of instruction in a recognized theological school, which would entitle him to a IV-D classification or in any event to a I-S classification on May 5, 1952 when he was ordered to be inducted. It is equally clear from the record, I believe, that Palmer's refusal to register and to fill out his questionnair, and his Form No. 150 was based upon his conscientious objection to participation in war in any form, which he believes he must carry to the extreme length of refusing to participate in any way, even for his own exemption, in the procedure prescribed by the Universal Military Training and Service Act for obtaining personnel for the armed forces.

The District Court held that Palmer's failure to fill out the prescribed forms furnished to him by the local board justified the board in wholly ignoring the information regarding him contained in its file and classifying him in Class I-A. I do not think that the law or the regulations thus exalt form over substance. *On the contrary the regulations make it perfectly clear that it is the duty of a local board, in classifying a registrant, to consider all written information contained in his file and not merely the official forms.* Thus § 1622.1 (c) of the Selective Service Regulations provides:

> "(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. *The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a* Classification Questionnaire (SSS Form No. 100) to

> the latest address furnished by a registrant shall be notice to the registrant that *unless information is presented to the local board,* within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." (Emphasis supplied) 32 CFR, Rev. 1951, § 1622.1(c).

Likewise § 1623.1(b) of the regulations provides, in pertinent part:

> "(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System *and such other written information as may be obtained in his file;* * * *" (Emphasis supplied) 32 CFR, Rev. 1951, § 1623.1(b).

It is thus authoritatively laid down that the local board in classifying a registrant must consider all the information in his file concerning his draft status. The Congress in the Universal Military Training and Service Act made specific provision for the exemption from military training and service of theological students and of sincere conscientious objectors to such training and service. I find nothing in the act or regulations to support the conclusion that a conscientious objector should be refused the appropriate classification and placed in Class I-A merely because his conscientious scruples against participation in war extend to participation in the preparatory procedure as well. To hold otherwise would be to impute to the Congress which has fully recognized the position of conscientious objectors and provided exemption for them as a class an intention to withhold that exemption from and to brand as felons those members of the class which have the most sensitive consciences of all the group. This I certainly can not do.

It follows that the local board in classifying Palmer should have considered all the information in his file, in

cluding his letters and statement and the letter from Dean Stidley of the Graduate School of Theology of Oberlin College.

It thus appears that when the local board classified Palmer in Class I-A it acted in plain violation of the law and regulations which required it to consider the material in his file in performing its duty "to hear and determine * * * all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [the Universal Military Training and Service Act] of all individuals within the jurisdiction of such local boards." 50 U. S. C. A. App. § 460(b)(3). Moreover it must be concluded that there was no basis in fact for the classification which the board made. For all the materials in Palmer's file point to the fact that he was a theological student satisfactorily pursuing a full time course in a well known theological school and that he was conscientiously opposed to participation in war in any form. There was nothing to raise an inference or even a suspicion to the contrary. Indeed the District Court in its opinion was at pains to point out Palmer's apparent sincerity. His sincerity is further attested by his willingness to undergo imprisonment, as he did, rather than participate in the selective service process, although, if he had been willing to do the latter, he would undoubtedly have been granted an exemption from military service. I would, therefore, hold upon the authority of Estep v. United States, 1946, 327 U. S. 114, and Dickinson v. United States, 1953, 346 U. S. 389, that the local board's action in classifying Palmer in Class I-A was beyond its jurisdiction and void.

The Government asserts, however, that the invalidity of his classification is not available to Palmer as a defense to his present prosecution because he failed to exhaust the

administrative remedies open to him to secure its correction. Falbo v. United States, 1944, 320 U. S. 549, is relied upon as authority for this proposition. If the Supreme Court in the Falbo case intended to hold that a registrant who refuses to obey an order to report for induction which is clearly beyond the jurisdiction of the local board and, therefore, void may never, under any circumstances, defend a criminal prosecution brought for his failure to obey it if he has not exhausted all intermediate administrative remedies open to him, the Government's position is right. But I do not think that the Falbo case may be taken to go so far. For in Estep v. United States, 1946, 327 U. S. 114, the Supreme Court laid down the rule that if a classification by a local board is without any basis in fact, it is beyond the board's jurisdiction and its invalidity may be asserted as a defense to a prosecution for declining to submit to induction pursuant to the board's subsequent induction order. The basis for the Court's conclusion was that to hold otherwise, in the absence of clear language in the Act, would not square with our concepts of justice. In this connection the Court said (pp. 119-123):

> "By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes * * * But § 11 is silent when it comes to the defenses, if any, which may be interposed.
>
> "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive * * * Judicial review may indeed be required by the Constitution. *Nug Fung Ho v. White*, 259 U. S. 276 * * *
>
> "The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. Their authority to hear and determine all questions of deferment or exemption is, as stated in § 10(a) (2), limited to action 'within their respective jurisdictions'. It is

only orders 'within their respective jurisdictions' that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11 * * *

"Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction does not stand on a different footing * * * If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of the law. If a local board refused to reopen on the written request of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction.

"We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights. Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loath to resolve those doubts against the accused. We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused. The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under

> this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

I think that the Supreme Court in the Falbo case merely applied the rule that failure to exhaust administrative remedies precludes resort to the courts[1] to the extent of holding that the defense of invalidity of the board's order was not available to Falbo since he had not exhausted the administrative remedies open to him subsequent to the order for induction. For the order for induction was not final under the procedure then in effect.[2]

The Court stated that the narrow question presented was "whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process" and the Court found that Congress had not done so, stating (320 U. S., at p. 554):

> "* * * The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period,

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[1] Myers v. Bethlehem Corp., 1938, 303 U.S. 41, 50-51: " . . . the long-settled rule of judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

[2] At that time the regulations called for a physical examination at the induction center as a result of which the registrant might be rejected at that final stage. The regulations have since been amended to provide for a preinduction physical examination. See Gibson v. United States, 1946, 329 U.S. 338.

> Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense * * * Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so."

But in the light of the Estep case I cannot take this language to mean that Congress has precluded, under any and all circumstances, a defendant in a criminal prosecution for failure to obey an induction order from defending upon the ground of the invalidity of the order if he has not pursued all the intermediate administrative remedies open to him prior to the final administrative action. For it will be recalled that in the Estep case Justice Douglas, speaking for the Court, said (327 U. S., at pp. 121-122):

> "We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. We are dealing here with a question of personal liberty."

The courts of appeals and district courts have been divided as to whether exhaustion of all administrative remedies must be shown in these selective service cases.[3] Moreover it may well be argued that section 10 of the Adminis-

[3] With the cases cited by the majority compare United States v. Greene, 7 Cir. 1955, 220 F. 2d 792; Rempel v. United States, 10 Cir. 1955, 220 F. 2d 949; Ex parte Fabiani, E.D. Pa. 1952, 105 F. Supp. 139; United States v. Shaw, W.D.N.Y. 1953, 118 F. Supp. 849; United States v. Giessel, D.N.J. 1955, 129 F. Supp. 223.

trative Procedure Act[4] has broadened the scope of judicial review in these cases.[5] For the Universal Military Training and Service Act expressly excludes from the operations of the Administrative Procedure Act only the "functions performed under this Act."[6] Judicial review is hardly a function performed under the Universal Military Training and Service Act, especially since the act is silent on the subject.

Accordingly I do not think that the law is inflexibly to the effect that never, under any circumstances, could the courts permit the defense of the invalidity of the board's order to be interposed if the registrant had not exhausted his intermediate administrative remedies. For the doctrine of exhaustion of administrative remedies is not an inflexible rule of the law and in appropriate cases the courts have declined to apply it.[7] Thus if an agency has acted beyond its power or jurisdiction the courts have, in the interests of justice sometimes permitted that fact to be relied upon in defense even though administrative remedies have not been wholly exhausted.[8] The present case seems to me to be of this exceptional kind.

It is perfectly clear that the Congress intended that divinity students and sincere conscientious objectors should be exempted from military service. The action of the local board in failing to follow the Congressional mandate obliterated a right which the Congress had granted.[9] Its ac-

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[4] U.S.C.A. § 1009.
[5] Compare Shaughnessy v. Pedreiro, 1955, 349 U.S. 48.
[6] 50 U.S.C.A. App. § 463.
[7] Davis on Administrative Law, 1951, §§ 188, 189, 190; 1 Vom Baur, Federal Administrative Law § 233.
[8] Gonzales v. Williams, 1904, 192 U.S. 1, 15; Waite v. Macy, 1918, 246 U.S. 606; Skinner & Eddy Corp. v. United States, 1919, 249 U.S. 557, 562-563; United States v. Watkins, 2 Cir. 1947, 163 F. 2d 328; 330; United States v. O'Donovan, 7 Cir. 1950, 178 F. 2d 876, 879-880.
[9] Compare Switchmen's Union v. Board, 1943, 320 U.S. 297, 300; Order of Conductors v. Pitney, 1946, 326 U.S. 561, 566.

tion in classifying Palmer in Class I-A was, as we have seen, beyond its jurisdiction, being without basis of fact in the record and in the teeth of the regulations which required it to consider all the materials in his file when classifying him. And if the exhaustion of remedies rule is applied here to prevent Palmer from showing these facts in his defense the very basis for the Congressional exemption, to which the District Court concedes on the facts he is entitled, will operate to stamp him a felon. For it is perfectly clear that it was solely because of the unusually sensitive nature of his conscientious scruples against war that he found himself unable to pursue the administrative remedies open to him in the selective service system. The Congress could hardly have intended that through the inflexible operation of the exhaustion of remedies doctrine the exemption which it freely accorded to all sincere conscientious objectors should be denied to those alone among them who have shown themselves the most deeply conscientious.

It is worth noting also that even though Palmer had not followed the intermediate administrative procedure available to him *the administrative process had ended in his case with the board's order for his induction. For that order was a final one the disobedience of which could be defended, exhaustion of intermediate remedies aside, upon the ground of its invalidity.*[10] Permitting him to interpose in this case the defense of the invalidity of the order accordingly cannot have the effect of interrupting the administrative process of selection which is the basic reason for the exhaustion doctrine itself and the consideration which moved the Court to deny the right to interpose the defense of invalidity in the Falbo case. In this respect the

[10] Gibson v. United States, 1946, 329 U.S. 338; Tamblyn v. United States, 5 Cir. 1954, 216 F. 2d 345.

present case is indistinguishable from Estep. I conclude that Palmer should have been permitted to raise the defense that the board's order for his induction was invalid. I have already shown that the order was wholly void. It follows, I believe, that Palmer was not guilty of a criminal offense in refusing to obey it and that the District Court should have granted his motion for a judgment of acquittal.

I think there is an additional reason for holding that Palmer's motion for judgment of acquittal should have been granted. Section 6(i)(2) of the Universal Military Training and Service Act provides that a person who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution is ordered to report for induction shall be deferred until the end of the academic year. Section 1622.15(b) of the regulations[11] directs the local board to place such a student in Class I-S. Here the materials in Palmer's file on May 5, 1952 disclosed to the board that he was satisfactorily pursuing a full-time course of study at the Graduate School of Theology of Oberlin College when on that day the board ordered him inducted on May 20th. That induction order was, therefore, in clear violation of the law and regulations regardless of the validity of Palmer's prior classification. Since upon this view the final induction order of the board was invalid regardless of what had gone before and since Palmer was not required to obey it before asserting its invalidity as a defense,[12] I think that the question of exhaustion of administrative remedies does not really arise in the case.

I am authorized to say that Judges McLaughlin and Hastie join in the views expressed in this opinion.

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[11] 32 CFR, Rev. 1951, § 1622.15(b).
[12] Gibson v. United States, *supra;* Tamblyn v. United States, *supra.*

APPENDIX.

"Concordville, Penna.
July 13, 1950

Selective Service Local Board #60
113 South Ave.
Media, Penna.

Dear sirs,

In September 1948, when the selective service law went into effect, I informed my local draft board in Modesto, Calif. of my refusal to register, as a Quaker and a Christian pacifist. To date they have taken no action on my refusal. Recently I have moved to the address on the head of this letter—Concordville, Penna., and feel that I should inform you of my presence in the area of your jurisdiction, in case any inquiries should be made on my case, or any action is desired to be taken against me. I will be going to seminary in September at Oberlin, Ohio, and will inform you of my address there. I have notified the local board in Modesto of my address change.

Sincerely yours,

(Sgd.) T. VAIL PALMER, JR."

"Concordville, Penna.
July 22, 1950

Selective Service System
Local Board No. 60
Media, Penna.

Dear Sirs,

Your letter of July 20 arrived today, directing me to report to your office for a conference on Selective Service regulations. I have been informed that the likely purpose

of such a conference would be to carry out the instructions of the Department of Justice that those refusing to register for Selective Service should be called before their local board and asked to give the information required on the registration form, and that if such information is given, the person shall be considered 'automatically registered' under the law, even if he refuses to sign the form, as was clarified in the case of Edgar Norton of Glens Falls, New York.

Since my conscientious objection to war involves a break with the conscription as a whole, it seems that I would be untrue to my beliefs if I thus allowed myself to be registered. Therefore, I regret to inform you that I feel constrained to disobey the order to report to your office, and to accept whatever consequences may ensue from such action.

Sincerely yours,

(Sgd.) T. VAIL PALMER, JR."

"COURT STATEMENT OF T. VAIL PALMER, JR.

From the time when Moses brought down from Mt. Sinai the Divine Commandment: 'Thou shalt not kill', there can be seen in the Bible a growing realization that God does not want men to kill or to hate. Jesus Christ, who lived in a land suffering under a foreign, totalitarian oppressor, showed us the way by refusing either to fight or to appease the Romans.

If killing and hatred are thus wrong, how can war, which is killing and hatred on an enormous scale, be then right; how can God want men to fight? I say from the depths of my heart that to fight, to be a soldier, is unchristian and morally wrong. Yet I cannot condemn those who fight and die for their country. For they are doing the very best they know. It is at least better to kill than to be a coward!

Men desperately need to see the Christian alternative of sacrificial love for all men. But the federal government, in passing the Selective Service Act, has made this alternative much more difficult. It is easy to believe that the commandment of the state to learn to kill is a moral duty. For in general, laws *should* be obeyed; in a democracy there are very few laws that directly violate God's laws.

But the very purpose of the Selective Service Act is to require men to do a thing which goes directly against the Divine law of love. I know, indeed, that if I registered I could be exempted as a conscientious objector, that *I* would not be made to do that wrong. But it is not only my own soul that I am concerned about. There are millions of others whom the law compels to become soldiers, and thus to do evil, believing that they are doing good! It is my Christian duty to disobey any law whose basic purpose is so anti-Christian. Even to register is to accept and support this law. I cannot compromise with such a law!

Most people feel that war is necessary to avoid the evils of Communism and conquest by Russia. But in our day, Gandhi and his followers have shown—and successfully—that there is another way to overcome evil. Another fact is that, in Nazi Germany and occupied Europe during the last war, many pacifists were leaders in non-violent underground movements against Naziism. I am convinced that, if so great a calamity should ever come as the invasion or occupation of this nation by a totalitarian power, it will again be, among others, the pacifists—and particularly those who now will not compromise—who will refuse to knuckle under and become slaves, but will firmly, yet in love and respect for personality, decline to cooperate with the occupying power. For the pacifist, it takes more than prison or military defeat to take away one's freedom to live, think, and act as whole men and Sons of God."

"Quadrangle
Oberlin, Ohio
December 9, 1951

Selective Service
Local Board No. 60
Media Real Estate Co. Bldg.
113 South Avenue
Media, Pa.

Dear sirs:

SSS Form No. 100 (Classification Questionnaire) was forwarded from Concordville and reached me on December 8, 1951 at the above address, where I am now resident, as a student at the Graduate School of Theology of Oberlin College.

As you know, my conviction that war and conscription are contrary to God's law led me to refuse to register for Selective Service. This refusal was continued by my refusal to report for conference, as indicated to you in my letter of July 22, 1950. As a result of these actions, I was sentenced by the Federal District Court in Philadelphia for a term of a year and a day, which I have served.

I realize that my refusal to comply may have put you in an inconvenient situation. Please understand that this was not, and is not, intended personally, that I sympathize with your desire to follow the regulations which you are set up to enforce. I do not intend by my actions any criticism whatever of you in your position. I would not cause this trouble if I were not deeply convinced that the very concept of conscription is essentially unjustifiable to a Christian nation.

In hope that I may further clarify the reasons for my action, I am enclosing a copy of the 'court statement' I issued at the time of my sentencing. I believe that it is clear

from this statement that my act of refusal to register stems from a basic opposition to the Selective Service Act *as a whole,* and that I can thus no more comply with any other portion of that Act than I could with registration.

I am therefore returning SSS Form No. 100 without filling it out. I hope I have made it clear that I consider this act not as a new and separate disobedience of the Selective Service Act, but simply as a continuance of the act of refusal to register, for which I have already served the legal penalty.

Sincerely yours,

(Sgd.) T. Vail Palmer, Jr."

"The Graduate School of Theology
Oberlin College
Oberlin, Ohio.

Office of the Dean — December 11, 1951

Selective Service
Local Board No. 60
Media Real Estate Co. Bldg.
113 South Avenue
Media, Pa.

Gentlemen:

T. Vail Palmer, Jr., is a First Year student in the Graduate School of Theology, and is currently pursuing a full time course of 16 semester hours. The course in which he is enrolled requires 90 semester hours and ordinarily takes three years. This current year he won a competitive entrance scholarship, and is a student in good standing.

This information is sent in order to throw light upon his Selective Service status.

If there are any questions concerning him, I shall welcome an opportunity to try to answer such.

Sincerely,

(Sgd.) Leonard A. Stidley
Dean"

"Quadrangle
Oberlin, Ohio
February 15, 1952

Selective Service
Local Board No. 60
Media Real Estate Co. Bldg.
113 South Avenue
Media, Penna.

Dear sirs:

I believe that God is an infinite personal being. His nature of justice and love is revealed to us in the experiences of the leaders of all religious, and particularly in the Old and New Testaments, in the person of Jesus Christ, and in the Spirit, the Light Within, that guides men in their lives today. The love of God for us is the supreme fact of the universe and demands our highest loyalty, faith, and obedience. Even the Christian commandment of love to all men derives from God's love for us, which send us forth to love others. So much the more, then, are the demands for human justice and for obedience to human authority subordinate to God's will.

God's love is never coercive; he never forces us to do anything. Likewise, our love of all men should be exercised without force or coercion. I am not sure that force can ultimately be justified in any sphere of human relationships.

Much of my belief in pacifism came as a result of my being raised in a Quaker pacifist family. My present position was largely clarified in the sharing of a small group of young Friends that met weekly in Philadelphia for worship, meditation, and fellowship from 1946 to early 1948. The most influential member of that group was Robert M. Hazelton. Many individuals have provided guidance in my religious growth; I cannot point to any one person who is at present outstanding in this matter.

My present enrollment in theological seminary, my experiences in the past 3 years of having led 2 Bible study groups, and my having become a member of the Kirkridge movement last fall would probably be the most obvious outer indications that I consider my basic orientation to be religious. My year and a day sentence to federal prison for refusal to register for Selective Service should indicate the extent of my pacifist convictions.

The most direct public statement of my stand was the court statement I issued at the time of my sentencing for refusal to register, a copy of which I have sent you with my letter of December 9, 1951. My article, 'The Essence of Liberty' in the October 20, 1951 issue of *Friends Intelligencer,* and my letter in the July 7, 1951 issue of *The Peacemaker,* deal with the question of how a conscientious objector should act in prison. I have spoken or led discussions a number of times on matters relating to peace or to my stand. The most significant of these was at a public meeting sponsored by the F. O. R. in New York City, October 1, 1950, where I spoke on my stand, from the same platform as A. J. Muste and Milton Mayer, leading U. S. pacifists.

I attended Concord School #1, Concordville, Pa. (public) from 1933 to 1940; West Chester High School, West

Chester, Pa. (public) 1940-1942; George School, George School, Pa. (church) 1942-1944; University of Pennsylvania, Philadelphia, Pa. 1944-1948; Modesto Junior College, Modesto, Calif. (public), 1949-1950; Graduate School of Theology, Oberlin College, Oberlin, Ohio (church), 1951-. From 1948 to 1950 I worked as a farm worker at Tuolumne Co-operative Farms, Rt. 8, Box 1959, Modesto, Calif. In 1950 I did 'handy man' work for John Wolf, Concordville, Pa.

My addresses have been: Concordville, Penna., 1931-1951; Box 448, U. of Penn. Dorms, 37th & Woodland, Philadelphia, 4, Penna., 1945-1948; Rt. 8, Box 1059, Modesto, Calif., 1948-1950; Box No. PMB 8337, Danbury, Conn., 1951. My parents, Thompson V. Palmer and Esther L. Palmer, are both now living at R. #5, West Chester, Pa. They are both Quakers.

I have never belonged to any military organization. I am a member of the Religious Society of Friends, belonging to both Philadelphia Yearly Meetings, at 1515 Cherry Street, Philadelphia 2, Pa., and 304 Arch Street, Philadelphia 6, Pa., respectively. My home meeting is Concord United Meeting, Concordville, Pa.; at present I am attending Oberlin Meeting, Sturges Hall, Oberlin, Ohio.

The Society of Friends is one of the so-called 'historic peace churches.' The 'Advices on Conscription and War', issued by a Meeting representing Friends in the United States, held in 1948 at Richmond, Indiana, and since adopted by many Yearly Meetings and other Friends groups, say in part: 'Friends are exhorted to adhere faithfully to this testimony against all wars and fighting, and in no way to unite with any warlike measure such as a Selective Service Draft or Universal Military Training. • • • We warmly approve civil disobedience under Divine

Compulsion as an honorable testimony in keeping with the history and practices of Friends.'

I have been an active member of the Fellowship of Reconciliation, a religious pacifist organization, since about 1947. I have also been a member of the Boy Scouts of America, several Consumers Co-operatives, the Kirkridge Movement (an interdenominational movement of religious discipline and fellowship), and the Rural Life Association (a religious organization promoting rural life).

The following persons might be able to give information regarding the consistency of my pacifist stand (none are related to me):

J. Barnard Walton, 132 Park Ave., Swarthmore, Pa. Executive Secretary, Friends General Conference, (retired).

Wendell B. Kramer, 1320 So. San Joaquin, Stockton, Calif., Methodist minister, former manager of Tuolumne Co-operative Farms, Inc.

William K. McDermott, Supervisor of Classification and Parole, Federal Correctional Institution, Danbury, Conn.

Leonard A. Stidley, Dean, The Graduate School of Theology, Oberlin College, Oberlin, Ohio.

I am conscientiously opposed to participation in war in any form, and further am conscientiously opposed to any training or service in the armed forces or to any service in which I would be under the supervision and control of the Selective Service System.

(Sgd.) T. Vail Palmer, Jr."

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
T. VAIL PALMER, JR.

(Filed July 1, 1954)
Criminal No. 16348

Opinion and Order

GRIM, J. July 1, 1954

Defendant, a member of the Society of Friends, *appears without question to be a sincere conscientious objector, and* under the Acts of Congress and the Selective Service Regulations *he would have been entitled to a I-O* classification if he had properly submitted the facts of his case to the selective service system. But this he has refused to do. He failed to register, for which he was indicted and, in November, 1950, sentenced by this Court to serve a term of a year and a day in prison. He served his term in prison at Danbury, Connecticut. The day before his release from prison the warden, without his cooperation, registered him for selective service.[1] The warden transmitted his registration card to Local Board No. 60, Media, Pennsylvania. His domicile was at Concordville, Pennsylvania, which was within the area of the jurisdiction of Media Board No. 60.[2]

[1] The regulations provide for this type of registration of a non-cooperative potential inductee, 32 C.F.R. Sec. 1613.41 (1949 ed.).

[2] Defendant contends that his domicile was not at Concordville and not within the jurisdiction of the Media Board. The evidence in reference to this problem is not as clear as it might be, but it indicates that from early boyhood until recent years he lived at Concordville with his parents, who still reside there. He went to California, to Ohio and, of course, to Danbury, Connecticut, for various reasons, but none of them in my opinion indicates that he ever went away from Concordville with the intention of making a permanent home elsewhere. He went to California to be among other conscientious objectors to try to understand their point of view. He went to Ohio to study in college. He went to Connecticut to serve his prison sentence.

On December 5, 1951, the Media Board sent the usual selective service questionnaire (Form No. 100) to the defendant. Four days thereafter defendant returned it to the Board unexecuted with a letter stating that he would not execute the questionnaire or otherwise cooperate with the selective service system and explaining that *his religious beliefs impelled him to take this position.*

On January 30, 1952, a notice was mailed to defendant ordering him to report for a physical examination on February 15, 1952. Without any request from him, on February 12, 1952, the special form (No. 150) which is provided by the selective service system for registrants who claim to be conscientious objectors was sent to defendant to give him an opportunity to present the facts of his case to the Local Board. On February 19, 1952, the Local Board received back from defendant Form 150. It was entirely unexecuted, but with it *defendant submitted to the Local Board a letter which set forth substantially all the information which would have been set forth in Form 150* if defendant had executed it.

On February 14, 1952, the Local Board classified defendant I-A.

Defendant did not report for his physical examination on February 15, 1952, as he had been ordered to do on January 30th. On April 8, 1952, the Local Board sent another notice to defendant ordering him to report for a physical examination, scheduled this time for April 16, 1952. Defendant did not report for the physical examination on April 16, 1952. He has never reported for nor been given a physical examination by the selective service system.

On May 5, 1952, the Local Board mailed defendant an order to report for induction on May 20, 1952. He refused

to appear at the induction station as ordered and as a result this criminal prosecution followed. The case was tried before me without a jury. Defendant was found guilty. He has filed a motion for judgment of acquittal.

Defendant has interposed several defenses. His principal defense is that the action of the Media Board in classifying him as available for military service (I-A) was beyond its jurisdiction because there was no basis in fact for the I-A classification. He points out that all the evidence indicates that he is a sincere conscientious objector and that, therefore, he should have been classified I-O. He is correct in his contention that all the evidence indicates that he is a sincere conscientious objector. The evidence also shows that he was a student in the theological school at Oberlin College in Ohio. Normally this would entitle him to a I-S classification as a student or a IV-D classification as a ministerial student.

This case raises the question whether a registrant can challenge the legality of his I-A classification as a defense in a criminal prosecution against him when he has failed and refused to exhaust his administrative remedies for securing a different classification, to submit to a physical examination, and to report for induction.

According to *Falbo v. United States,* 320 U. S. 549, *Billings v. Truesdell,* 321 U. S. 542, *Estep v. United States,* 327 U. S. 114, and subsequent cases, before a defendant in a criminal prosecution under the Selective Service Act of 1940 could properly raise the defense that his selective service board acted beyond its jurisdiction in denying his claim to a classification other than I-A (subject to induction), he must have completed the following procedural steps. (1) exhausted his administrative remedies for

securing a different classification; (2) submitted to a physical examination to determine his fitness for military service, and (3) obeyed the order to report for induction,[3] but refused to take the oath of induction. In the recent case of *Dickinson v. United States*, 346 U. S. 389, involving a prosecution under the Universal Military Training and Service Act of 1948 for refusal to submit to induction, the Supreme Court in its detailed statement of the facts was careful to point out that the defendant had exhausted his administrative remedies for securing a different selective service classification and that he reported to the induction center as ordered but refused to submit to induction. It is quite clear, therefore, that as a matter of administrative law the Supreme Court has held that a registrant must exhaust his administrative remedies within the selective service system and then report for induction to the induction station as a prerequisite to his raising the defense of an alleged illegal classification by the selective service system in a criminal prosecution.

Defendant has urged this Court to relax the exhaustion rule in the present case, contending that the stated purposes of the Selective Service Acts of 1948 and 1951, under which the present prosecution was brought, are different from the stated purposes of the 1940 Act under which the above cited *Falbo*, *Billings*, and *Estep* cases were decided. He contends that the Act of 1940 was in urgent preparation for war while the Acts of 1948 and 1951 were merely to maintain sufficient armed strength to deter aggression and not to prepare for war. In my opinion, the 1940 Act and the later acts, including their basic purposes, are essentially the same. Using hindsight, defendant correctly points out that the 1940 Act was in

[3] But cf. *Gibson v. United States*, 329 U.S. 338 (1946).

preparation for our participation in World War II. However, using the same device of hindsight, this Court might say that the Act of 1948 was in preparation for the Korean War. Furthermore, the amending Act of 1951 was passed in the midst of the Korean War.

In addition to attempting to distinguish the purposes of the Selective Service Act of 1940 from those of the later acts, defendant contends that the exhaustion rule laid down by the Supreme Court in the *Estep* case for World War II prosecutions should not be strictly enforced during the present peacetime conditions. He argues that, although the urgent circumstances of wartime do not allow "litigious interruption of the process of selection which Congress created",[4] the national security will not be impaired during peacetime by this Court's relaxation or modification of the rule that exhaustion of administrative procedures is a condition precedent to judicial determination of the defense of illegal classification in a prosecution for violation of the selective service laws. Otherwise stated, defendant contends that the applicability of the Supreme Court's exhaustion rule should depend on whether an alleged violation of the selective service laws occurs during a period of urgent wartime mobilization or during a period of less urgent peacetime military training and service.

The Supreme Court has not up to the present time modified its strict exhaustion rule. Several Lower Courts, however, have held[5] or indicated by way of dicta[6] that un-

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[4] *Falbo v. United States*, 320 U.S. 549, 554 (1944). In deciding this case the Supreme Court was faced with the problem of "reconciling the basic principle of justice with military need in wartime". 320 U.S. 549 at 555 (dissenting opinion of Justice Murphy).

[5] *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952); cf. *Rinz Alicea v. United States*, 180 F. 2d 870 (1st Cir. 1950).

[6] *Schwartz v. Strauss*, 206 F. 2d 767 (2d Cir. 1953) (concurring opinion of Judge Frank); *United States v. Tomlinson*, 94 F. Supp. 854, 858 (E.D. Pa. 1950).

der certain circumstances the exhaustion requirement may be relaxed. But assuming *arguendo* that the exhaustion requirement under certain circumstances may be relaxed during peacetime, the circumstances of the present case certainly do not call for any such relaxation. I hold, therefore, that the exhaustion rule laid down by the Supreme Court in the above cited cases is controlling in the present case.

Defendant has willfully and defiantly refused to follow the administrative procedures which have been set up for his benefit. He has taken and maintained the extreme religious position that he will not comply with the selective service laws nor cooperate in any way with the selective service authorities. The Society of Friends, of which defendant is a member, officially approves but does not require its members to take defendant's extreme religious position.[7]

Defendant has already served a prison term for a previous failure to register. His present registration was effected by prison authorities pursuant to the regulations through no cooperation on his part. He has disdained to execute and submit a Form 150 which is required of any person seeking an exemption as a conscientious objector. 32 C. F. R. Sec. 1621.11. He has failed to request a student deferment (Class I-S) to which he apparently was en-

[7] In a Statement entitled "Freedom of Religion and the Present Draft Law", adopted by the two Philadelphia Yearly Meetings of the Religious Society of Friends, March 28 and 29, 1949, the following paragraph appears:

"We believe that *every young man who, under a sense of religious compulsion, feels that he must refuse to comply with the Draft Law, at any point, should follow the supreme authority of his inner guide.*"

In a leaflet entitled "Advices on Conscription and War" by the Religious Society of Friends in the United States, adopted by a called Meeting held at Earlham College, Richmond, Indiana, July 20-22, 1948, the following statements are included:

". . . Friends are urged . . . to support Young Friends and others who express their opposition to conscription either by non-registration, or by registration as conscientious objectors . . . Nevertheless, we hold in respect and sympathetic understanding all those men who in good conscience choose to enter the armed forces."

titled by virtue of his full-time studies at Oberlin College. 32 C. F. R. Sec. 1622.15 (b). He has failed to seek a possible exemption as a divinity student (Class IV-D). 32 C. F. R. Sec. 1622.43(4).

Defendant has stated unequivocally under oath that he has refused and will continue to refuse to puruse any of the administrative procedures available to him and to obey any and all orders of selective service officials. He has consistently refused to have anything whatsoever to do with the selective service system except to write an occasional letter to his local board explaining his refusal to cooperate.

The present selective service laws and regulations do not cover a person with defendant's extreme form of conscientious objection, since they require all persons claiming exemption as conscientious objectors to assert and process their claims through the administrative machinery created by Congress. Only Congress has the power to create a new and separate procedure for conscientious objectors who, like defendant, are prevented by their religious beliefs from cooperating with the selective service system. This Court must uphold the selective service laws and regulations as they are presently constituted.

I hold that defendant, Palmer, is barred in this judicial proceeding from attacking the Media Board's jurisdiction to classify him 1-A, because he has failed to pursue the administrative procedures available to him. Therefore, his conviction, based on the Government's *prima facie* case, will be sustained.

The statements of fact and law in the foregoing opinion will constitute the Court's findings of fact and conclusions of law in the case.

WILLIAM K. GRIM,
J.

Appendix C

Statutes and Regulations Involved

Section 6 (g) of Universal Military Training and Service Act (50 U. S. C. App. sec. 456 (g)):

> "Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, * * * shall be exempt from training and service (but not from registration) under this title."

Section 6 (i) of the Act (50 U. S. C. App. 456 (i)):

> "(2) Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the facts being presented to the local board, be deferred (A) until the end of such academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier * * * "

Section 6 (j) of the Act (50 U. S. C. App. 456 (j)):

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form * * * "

Section 6 (m) of the Act (50 U. S. C. App. 456 (m)):

> "No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Section 10 (b) (3) of the Act (50 U. S. C. App. 460 (b) (3)):

"The President is authorized—

* * *

(3) to create and establish within the Selective Service System civilian local boards * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe * * *"

Section 12 (a) of the Act (50 U. S. C. App. 462 (a)):

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *"

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009):

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely af-

fected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) * * * Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts. — Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any Court shall be subject to judicial review * * * "

Section 12 of the Administrative Procedure Act (5 U. S. C. 1011):

" * * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Selective Service Regulations, 32 C. F. R. 1604.54:

"The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law."

SSS Regulation sec. 1613.41 (32 C. F. R. 1613.41):

"(a) An inmate of an insane asylum, jail, penitentiary, reformatory, or similar institution, who is required to be registered on the day he leaves such institution, shall be registered in the manner prescribed in this section. The superintendent or warden of any such institution or any person designated by the superintendent or warden shall perform the duties of registrar.

* * *

(d) The superintendent, warden, or other designated person shall mail the Registration Card (SSS Form No. 1) of a person registered under the provisions of this section to the local board having jurisdiction over the area in which the institution is located."

SSS Regulation sec. 1622.1 (32 C. F. R. 1622.1):

"(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared 'that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.'

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it * * *."

SSS Regulation sec. 1622.14 (32 C. F. R. 1622.14):

"In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces."

SSS Regulation sec. 1622.15 (32 C. F. R. 1622.15):

"(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and during his academic year at such institution is ordered to report for induction * * * A registrant who is placed in Class I-S under the provisions of this paragraph shall be retained in Class I-S (1) until the end of his academic year, or (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier * * *."

SSS Regulation sec. 1622.43 (32 C. F. R. 1622.43):

"In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; * * *."

SSS Regulation sec. 1622.44 (32 C. F. R. 1622.44):

"In Class IV-F shall be placed any registrant * * * (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service * * *."

SSS Regulation sec. 1623.1 (32 C. F. R. 1623.1):

"(a) Each registrant shall be classified as soon as practicable after his Classification Questionnaire (SSS Form No. 100) is received by the local board or as soon as practicable after the time allowed for him to return his Classification Questionnaire (SSS Form No. 100) has expired. (*Note: By SSS Reg. 1621.11 the information as to conscientious objection, SSS Form No. 150 is made a part of SSS Form 100.*)

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file * * *."

SSS Regulation sec. 1623.2 (32 C. F. R. 1623.2):

"Every registrant shall be placed in Class I-A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class:		
	I-A-O	IV-A
	I-O	IV-B
	I-S	IV-C
	II-A	IV-D
	II-C	IV-F
	II-S	V-A
	I-D	I-W
	III-A	I-C

SSS Regulation sec. 1625.3 (32 C. F. R. 1625.3):

"(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning."

SSS Regulation sec. 1625.14 (32 C. F. R. 1625.14):

"When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

SSS Regulation sec. 1626.2 (32 C. F. R. 1626.2):

"The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition."

SSS Regulation sec. 1642.31 (32 C. F. R. 1642.31):

"(a) Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every man who has registered or who is required to register under the provisions of title I of the Universal Military Training and Service Act, as amended, immediately upon his reporting to or being brought before a local board or immediately upon his being taken into custody or his being placed in confinement:

(1) He shall be registered; provided, that any law enforcement official or any other authorized person may act as registrar.

(2) He shall complete his Classification Questionnaire (SSS Form No. 100).

(3) He shall complete his Special Form for Conscientious Objector (SSS Form No. 150), when applicable.

(4) He shall complete all other necessary forms.

(5) He may be physically examined.

(b) If such a man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board or the superintendent, warden, or other law enforcement official from information gained by interviewing the delinquent and from other sources."

Selective Service System, Local Board Memorandum No. 41, Issued, November 30, 1951:

"2. What Constitutes a Claim of Conscientious Objection.—A registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector.

3. Withdrawal of Claim Must Be in Writing.—Whenever a registrant has claimed conscientious objection to war the claim shall not be considered to have been withdrawn until the registrant voluntarily submits, and there is filed in his Cover Sheet (SSS Form No. 101), a written statement signed by him specifically withdrawing the claim. No verbal statement made by the registrant shall be considered as a withdrawal of his claim of conscientious objection * * *."